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No. 93-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. Sioux Manufacturing's Articles Of Incorporation Cannot Be Used To Obviate The Need For Exhaustion Of Tribal Remedies.

Respondent, Altheimer & Gray ("Altheimer"), in its Brief in Opposition advances an additional (or alternative) theory which the Seventh Circuit did not address on the question of whether an exhaustion of tribal remedies was required. The Seventh Circuit relied on the Letter of Intent and found a waiver by the Devils Lake Sioux Tribe

("Tribe") of the requirement of exhaustion. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993), Pet. App. 20. Now, Altheimer adds the Articles of Incorporation ("Articles") of Sioux Manufacturing Corporation ("Sioux Manufacturing") as an additional basis to support the Seventh Circuit's decision. Resp. Brief 9, 13, citing Articles § 4.2.2, Pet. App. 53. This theory is neither factually nor legally supportable.

Whether or not a waiver can be gleaned from the actions of officials of Sioux Manufacturing, as evidenced by the Letter of Intent, or from the actions of the Tribe's governing body, as evidenced by the Articles, the underlying question remains the same: whether Congress intended the diversity statute to permit a federal court in the first instance to interject itself into interpreting and construing tribal law and the actions of tribal officials in matters which admittedly involve tribal self-government, self-determination and economic development within that tribe's reservation. Altheimer has not pointed to (because it cannot) any authority which would indicate that Congress intended to permit such an intrusion on tribal sovereignty by a federal diversity court. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

Further, even if a federal court would interpret and construe tribal law (which it should not) the Articles and the Letter of Intent cannot under any reasonable interpretation and construction be said to have waived the requirement of exhaustion of tribal remedies. The Devils Lake Sioux Tribal Law and Order Code ("Tribal Code") treats the "requirement of exhaustion of tribal remedies" separately from that of sovereign immunity. *See* Tribal Code §§ 2-2-103 and 2-2-104, Pet. App. 49-50. There is, however, no specific provision within the Articles indicating an intent by the Tribal Council to deal directly with the re-

quirement of exhaustion or to specifically limit tribal court jurisdiction. Absent such language, the Articles cannot be found to restrict tribal court jurisdiction or to waive the requirement of exhaustion. *Cf. Brown v. Washoe Hous. Auth.*, 835 F.2d 1327, 1329 (10th Cir. 1988) (before a federal statute can be said to limit the presumptive jurisdiction of the tribal court an express congressional command to that effect is necessary). The provisions which Altheimer points to in the Articles and the Letter of Intent deal with sovereign immunity, but there is no unequivocal expression of intent therein to waive the separate requirement of "exhaustion." Resp. Brief 13, citing Articles § 4.2.2, Pet. App. 53, and Letter of Intent ¶ 9, Pet. App. 62-63. In addition, there is no expression of intent to extend the application of those provisions to a stranger to a contract, which is what Altheimer asks.

Finally, and perhaps more importantly, the Articles specifically disclaim any intent by the Tribal Council to consent to the jurisdictional authority of any government other than the Tribe with regard to the affairs of Sioux Manufacturing. The charter provides that

> [n]othing in these Articles of Incorporation nor any action of the Corporation shall be deemed or construed . . . to be a consent of the Tribe to the jurisdiction of the United States or of any state or any tribe other than the Devils Lake Sioux Tribe with regard to the business or affairs of the Corporation or the Tribe . . . .

Articles § 4.2.4, Pet. App. 54. Proper respect for tribal sovereignty requires that this limitation be respected and explicitly followed in determining whether there was a forfeiture of the tribal court's exclusive jurisdiction.

Thus, the additional theory advanced by Altheimer and the reasoning following by the Seventh Circuit are both

in conflict with federal policy and the decisions of this Court promoting direct, independent and exclusive authority of tribal courts over reservation commercial disputes. They are also contrary to tribal law.

2. Altheimer Misstates The Holdings Of The Ninth And Eighth Circuits On The Application Of The Tribal Exhaustion Rule.

In an attempt to create an appearance of an absence of conflict within the Circuits, Altheimer misstates the holdings of the Ninth and Eight Circuits. Resp. Brief 9-11. The Ninth Circuit in *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992), rejected the procedure followed by the Seventh Circuit in this case. As the Ninth Circuit's *en banc* decision expressly noted, resolution of the dispute in *Taylor* required interpretation of tribal legislative intent as a part of resolving whether the action was "barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation." 964 F.2d at 920. Because of this and other questions of tribal sovereignty presented by the case the Ninth Circuit held:

> that the district court correctly ruled that it *was required to abstain* from exercising its diversity jurisdiction over this tort action until the Colville Tribal Courts have resolved the substantial questions of tribal sovereignty presented by the facts in this case.

Id. (emphasis added). Contrary to Altheimer's contentions, this holding conflicts with the Seventh Circuit's decision sanctioning federal district court interpretation and construction of tribal law prior to and as a part of determining whether to abstain. *Altheimer*, 983 F.2d at 812, 815, Pet. App. 15-16, 20.

Also, Altheimer is incorrect in its representation that the Eighth Circuit's decision in *United States ex rel. Kishell*

v. Turtle Mountain Hous. Auth., 816 F.2d 1273 (8th Cir. 1987) is not in conflict with the Seventh Circuit's decision in this case. Resp. Brief 10. In *Kishell*, the Eighth Circuit concluded that the district court correctly refused to exercise federal jurisdiction based on diversity of citizenship because of the "Supreme Court's opinion in *Iowa Mutual* and *National Farmers*." 816 F.2d at 1277. Moreover, the Eighth Circuit then held that the defense of tribal sovereign immunity should not be considered by a federal diversity court "unless and until it has been initially established that the case is properly before the federal court." *Id.* at 1277 n.3. In conflict with *Kishell*, the Seventh Circuit here interpreted and construed tribal law and resolved the sovereign immunity issue prior to considering whether to abstain. *Altheimer*, 983 F.2d at 812, Pet. App. 15-16.

Finally, Altheimer is disingenuous when it asserts the Ninth Circuit "said nothing about 'judicial self-restraint' " in *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992). Resp. Brief 11. In fact, the express basis for the Ninth Circuit's holding that a federal court should abstain from considering the merits of a dispute, even where the federal government seeks to enforce federal law, was the "principle of judicial self-restraint" as delineated by the Supreme Court's decisions in *Iowa Mutual*, *National Farmers Union* and *Santa Clara Pueblo*. *Plainbull*, 957 F.2d at 728. Accordingly, contrary to Altheimer's misstatements, the Seventh Circuit's approach, in resolving the merits of the section 81 voidness issue first and its use thereafter of that decision as its very basis for not requiring an exhaustion of tribal remedies, is certainly in conflict with the principles of judicial self-restraint formulated by the Supreme Court and adhered to by the Ninth Circuit in *Plainbull*.

3. The Authority Which Altheimer Cites Does Not Support The Seventh Circuit's Departure From And Conflict With This Court's Directives Against Implying Waivers Of Sovereign Immunity.

Altheimer in its Brief in Opposition cites to the Court three lower court decisions in an attempt to justify the Seventh Circuit's decision to imply, for Altheimer's benefit, a waiver of sovereign immunity. Resp. Brief 15. The cited cases are distinguishable because each involved a claimant who was an actual contracting party and there existed an express intention to give the claimant itself a direct right to compensation and the ability to enforce that right against its fellow contracting party. *See Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670 (8th Cir. 1986); *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1440 (D. Idaho 1987); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23, 29 (D. Minn. 1974), aff'd, 517 F.2d 508 (8th Cir. 1975).

In stark contrast, the claimant in the present case, Altheimer, is not a signatory to the Letter of Intent under which it seeks the benefit of a waiver of sovereign immunity. Rather, Altheimer is a stranger to that agreement. Altheimer cites to nothing which would reflect an express and unequivocal intention on the part of the Tribe or Sioux Manufacturing to give a stranger to the Letter of Intent a direct right to compensation or the ability to enforce that right against Sioux Manufacturing.

Accordingly, Altheimer has failed to cite to this Court any decisional authority to justify the Seventh Circuit's departure from and conflict with the clear directives of this Court, which require that a waiver of sovereign immunity must be express and unequivocal and may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); *United States v. United States Fidelity &*

Guaranty Co., 309 U.S. 506, 513 (1940). *See also* Tribal Code §§ 2-2-104, 10-4-106, Pet. App. 50, 51-52.

4. The Seventh Circuit's Decision In *Wisconsin Winnebago Business Committee v. Koberstein* Further Exemplifies The Seventh Circuit's Departure From This Court's Application Of Section 81.

Altheimer is correct when it describes the Seventh Circuit's opinion in this case as following the principles first articulated by that court in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985). Resp. Brief 23, 28. The *Koberstein* decision, however, does not reveal support for limiting the application of section 81 to "land transactions." Instead, it reveals the beginning of the Seventh Circuit's departure from following the plain language of section 81 and the protective principles pronounced by this Court in *Green v. Menominee Tribe*, 233 U.S. 558 (1914).

In *Koberstein*, the Seventh Circuit criticized this Court's decision in *Green* as being "ancient" and as dealing with section 81 in a "cursory fashion." *Koberstein*, 762 F.2d at 617. The Seventh Circuit further criticized *Green* for not providing a "detailed explanation of why the statute applied," although it did acknowledge that section 81's application was triggered in *Green* because the dispute involved a "contract between an Indian tribe and a trader for supplies to be used in logging Indian land." *Koberstein*, 762 F.2d at 617.

In light of that criticism, it is telling that there is not even an acknowledgement of the *Green* decision in the Seventh Circuit's opinion in this case (although Sioux Manufacturing brought that case to the Seventh Circuit's attention in its briefs and at oral argument). What the Seventh Circuit began in *Koberstein* was extended further in this case: a complete rejection of the plain lan-

guage of section 81, as well as this Court's recognition of the broad protective breadth of that statute.

Contrary to Altheimer's averments, petitioner does not advocate nor do the facts of this case suggest a far-fetched or limitless interpretation of section 81. Resp. Brief 24-28. It is an attorney (Altheimer) here who alleges the agreement calls for the payment of monies and the granting of special privileges by an Indian tribe to the attorney. The district court found that the agreement offered by the attorney was, based on its plain language, "inextricably rooted in a planned transaction regarding Indian land." Pet. App. 40.[1] The broad protective language of section 81 was admittedly intended to specifically protect Indian tribes from exploitation by attorneys and claims agents. Cong. Globe, 41st Cong., 3d Sess. 1483-87 (1871). The concern for exploitation by attorneys is no less real today than in 1871 when the statute was originally enacted. In fact, it is the reality of that concern in matters which go beyond Indian tribes which the public has justifiably relied upon to demand increased regulation and accountability of attorneys.

There is certainly nothing onerous here about construing section 81 to require an attorney (Altheimer) to comply with federal law. If Altheimer desired to insure a contractual remedy to receive compensation from an Indian tribe which it opposed, it should have complied with the form and manner of execution requirements of section 81. As in *Green*, the contractual dispute in this case clearly falls "within the spirit of the statute and so exemplifies

[1] Altheimer, in an attempt to undercut this finding, tries to create an appearance of ambiguity by offering matters outside of the written agreement. Resp. Brief 3-4, 19-20. However, Altheimer's claim is based on the Letter of Intent and it is the plain language of that document which the district court properly found tied the contract to Indian land. Pet. App. 24, 31-32, 36, 40.

the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered." *Green*, 233 U.S. at 569.

The importance and substantiality of the section 81 issue has not been denied by Altheimer. Resp. Brief 24-28. To the contrary, Altheimer and Amicus acknowledge that the question has far-reaching implications for Indian tribes. *Id.* Amicus Brief 19-20. Accordingly, petitioner requests that review be granted.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and herein, this Court should grant petitioner's request for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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